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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 40 [redacted] 3

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,
Appellant,
v.
GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLEE

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THE OPINION BELOW

The Circuit Court of Wayne County, Indiana, delivered no opinion; its final decree is found at R. 9-10. The opinion

of the Supreme Court of Indiana is found at R. 30-35: It is reported in 221 Indiana 675, and has been reported in 51 N. E. (2d) 6. A copy of the opinion is also set forth in Appendix 2, *post*, p. 21.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on October 25, 1943 (R. 30). Appellant's petition for a rehearing in that court was overruled on November 22, 1943 (R. 39). Appellant's petition for appeal, appeal bond, citation with proof of service, and praecipe for transcript of record were filed and the Court's order allowing the appeal was entered on February 17, 1944 (R., 39-43). This court noted probable jurisdiction on April 3, 1944 (R. 46). The jurisdiction of this Court rests on section 237 of the Judicial Code. (28 U. S. C. 344.)

QUESTIONS PRESENTED

Appellant, trustee of a testamentary trust created by a resident of Indiana and himself a resident of that State, acting through New York Brokers and their Indiana correspondent, sold stocks and bonds upon the New York Stock Exchange in the usual and customary manner to persons resident outside of Indiana. The State of Indiana, acting through the appellee as its administrative officer, levied a tax upon appellant as such trustee measured by his entire gross receipts, including those received by such sales of securities. The questions are:

1. Whether the commerce clause of the Constitution of the United States requires that receipts from sales of securities upon a stock exchange in another State be ex-

cluded from the measure of a State tax levied upon a resident of the State and measured by his entire gross receipts. The record is silent as to the payment of any tax in any other state upon such transactions.

THE STATUTE AND REGULATIONS INVOLVED

The statute involved and the pertinent regulations applicable thereto are set out in Appendix "A" and "B" of the Appellant's Brief, and Appendix 1 of this Brief.

STATEMENT

The facts as stipulated by the parties have been fully and fairly stated by the appellant in his Brief. (Pages 3-8.)

SUMMARY OF ARGUMENT

I

The case of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307 and the cases following it are inapplicable to this case. The record does not disclose that appellant paid any tax upon this transaction in any other state.

II

This court has permitted a state to tax gross receipts from sales of tangible personal property whenever that tangible personalty has a physical situs in the state at the time the sale was consummated by delivery. The sale being an exercise of a right of property, this is in accord with the decisions of this court permitting property taxation of

tangible goods at their physical situs, which is also their legal situs.

Intangibles have a legal situs at the domicile of their owner and, by analogy to the cases permitting the taxation of receipts from the sales of goods, the receipts from the sales of intangibles would be taxable at the situs of such intangibles when the sale is consummated. In other words, appellant was properly taxed by Indiana upon the exercise of a right in property having a situs within the state.

III

It is not disputed that intangibles may be subjects of interstate commerce. However, the present tax does not discriminate against interstate commerce and, being levied upon a local event separate and apart from that commerce, it does not constitute an interference with it. Therefore, it is not prohibited by the Commerce Clause of the Constitution.

IV

The present tax was levied upon the local contractual aspect of intangibles and in no sense affected the national interest in the business of trafficking in such intangibles. Appellant dealt entirely in the local market maintained by and resulting from the national organization of brokers and stock exchanges which themselves conduct the interstate traffic in intangibles. To hold otherwise would dislocate the fiscal affairs of the states by concentrating the taxing power in those very few states in which securities exchanges are located.

The balancing of national and local interests requires that intangibles be taxed at their situs.

ARGUMENT

Appellant presents his case upon the basis of four premises or propositions which the appellee will discuss in the same order as they are presented in the brief for appellant.

I.

Primarily upon the basis of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, appellant argues that the Gross Income Tax Act of 1933 is unconstitutional and void as applied to receipts from sales of commodities by residents of Indiana to residents of other states. Appellee contends that this statement is neither accurate nor applicable to this cause.

The rationale of the Adams case, if not repudiated by this court, is at least subject to serious question. One major premise of that case was that the interstate features of the transactions involved were exposed to the danger of a multiplicity of taxes by the several states in which the component parts of the commerce occurred. This premise no longer exists. In *McLeod v. Dilworth Co.* (1944), 321 U. S. —, the facts were practically identical with the facts in the Adams case. This court held that the state of the purchaser could not levy a tax upon the sales involved thus eliminating any danger of a multiplicity of taxes. In *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. —, this court specifically held that where the record discloses no tax upon the same event by another state the mere possibility of such a tax will not invalidate the tax already levied and that as to the invalida-

tion of a tax by reason of a multiplicity of levies "* * * it will be time to cross that bridge when we come to it."

In the case at bar, the record does not disclose that any other state has levied a tax upon the sales of intangibles the income from which was taxed by Indiana. In fact, the record discloses that the only deductions from the gross sales price of the intangibles were "commission, cost of revenue stamps, postage, and any other expenses of sale." (R. 20.) And there is no contention that any other state did actually levy a tax upon such sales. Since the mere possibility of multiplicity of taxes is no longer to be considered as an invalidating factor, this rationale of the Adams case is not here applicable.

It is the further contention of the appellee that in *Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, 310-11, this court erroneously rejected the characterization by the Indiana Supreme Court of the Indiana Gross Income Tax as a tax upon residents based upon the privilege of domicile. Instead, this court described the tax as "* * * a privilege tax upon the receipt of gross income * * * a tax upon gross receipts from commerce." The tax upon residents of the state although levied in the same act is a separate and distinct tax from the tax upon non-residents. (Appellant's Brief, Appendix A, p. 45.) The former is levied upon the "receipt of the entire gross income of all persons resident and/or domiciled in the state." The latter is levied "upon the receipt of gross income derived from activities or businesses or any other source within the state" of non-residents. Thus, two taxes are levied upon different classes of taxpayers and upon different bases.

As to residents of Indiana, the tax is levied upon all receipts received from out-of-state sources except receipts

from businesses having a legal situs outside the State. (Sec. 1 (m), Appendix 1, p. 20, post.) Thus, wages earned outside the state, receipts from contracts performed outside the state, and receipts from other activities localized in other states are taxed and such tax can only be levied upon the basis that the recipient is domiciled within the state. Non-commerce receipts such as alimony, and damages for injury to the person and property are taxed so that the tax is not conditioned upon the engagement in commercial and business activities; it is conditioned solely upon the receipt of money by a resident of Indiana from any geographical source whether that money be produced by a commercial activity or not.

Under such circumstances the dissenting opinion in that case very properly distinguished the tax from those taxes previously condemned which were levied solely upon those who engaged in a certain business by reason of their engagement in that business.

The majority opinion distinguished between a gross income tax and a net income tax but such distinction is a distinction in degree and not in kind. Thus, the federal income tax appears to be progressing gradually by a reduction in allowable deductions from its original concept toward a gross income tax. The victory tax is an example of such progression. The tax on income in lower brackets is another such example. It is difficult to say at what point in the elimination of such deductions the nature of the case will be changed from a net to a gross income tax.

It has been indicated at times that the distinction between the two taxes is that the net income tax is based on the ability to pay while the gross income is not. Such a distinction neglects the fact that either profit or volume are

imperfect yardsticks of ability to pay and neglects other criteria of taxation completely. Thus, there is the principle that a taxpayer should pay taxes somewhat in proportion to values received from the state and that two businesses of an identical nature and of equal volume equally avail themselves of the protection afforded by the state whether each is equally profitable or not.

It is the contention of the State of Indiana that where it levies a tax upon those residents solely by reason of their domicile and measures that tax by the volume of their total activities as that volume is expressed in the receipts from those activities, such tax being levied equally upon all without any discrimination, the mere fact that a portion of that measure may be derived from activities in interstate commerce does not invalidate the tax any more than would be the case if the tax were measured by net income, a portion of which measure arose from activities in interstate commerce.

The applicability of *J. D. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, to sales of intangibles as distinguished from sales of commodities will be later discussed. The principles here contained are that, as later modified and possibly even repudiated, the premises upon which that case was decided can no longer be said to be sound and that case is of very doubtful authority. The other cases upon which appellant relies in the first portion of his argument which follow the Adams case partake of the same infirmities.

II.

The appellant next argues in substance that this court has held that where tangible property is sold in interstate

commerce the state of the buyer may tax but the state of the seller may not, and that this rule applied in this case would require that the tax imposed upon appellant be invalidated.

It would appear that appellant has misconstrued the decisions of this court. Two cases decided at the last term of this court appear to negative the rule for which appellant contends. In *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. —, the court had under consideration, among others, certain sales by a resident of Indiana to a resident of Ohio, delivery being made in Indiana. Indiana levied a tax upon its resident measured by the receipts from such sale. The court sustained this tax by the state of the seller. In *McLeod v. Dilworth Co.* (1944), 321 U. S. —, the court had under consideration a sales tax by the state of the buyer upon goods which were delivered to the buyer by delivery to a carrier outside the state and this court invalidated such tax by the state of the buyer. Any attempt to synthesize a simple rule from these cases in which are involved solely diverse situations of fact is sure to be difficult.

Tangible personal property is transitory and acquires a situs for purposes of property taxation at its physical location. The right to sell property or to receive income from the sale of property are two of the bundle of rights which together constitute the aggregate property right which is the subject of property taxation. It is but proper then to permit the part to be taxed where the whole may be taxed. This principle was stated in *McGoldrick v. Berwind-White Coal Min. Co.* (1940), 309 U. S. 33, 52.

> "• • • we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may

> be laid in like fashion on the property itself. That the latter is a permissible tax has long been established by an unwavering line of authority. As we have often pointed out, there is no distinction in this relationship between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements."

and this court has permitted taxation of sales and receipts from sales at the situs of the goods when the exercise of the right to sell was consummated by delivery of the goods to the purchaser or to the carrier as agent of the purchaser, whether such delivery was preceded by interstate commerce. (*McGoldrick v. Berwind-White Coal Min. Co.* (1940), 309 U. S. 33; *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. — (Class E Sales) or was followed by interstate transportation of goods; *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62; *International Harvester Co. v. Department of Treasury* (1944), 321 U. S. — (Class D Sales),

Conversely, a propery tax upon tangible personalty having a physical situs out of the state cannot be sustained upon the basis that the owner is domiciled within the state. *Union Transit Co. v. Kentucky* (1905), 199 U. S. 194, 204. Consistent with this rule are the cases denying the power of a state to tax the right to sell goods which have a physical situs outside the state at the time the sale is consummated by delivery to the purchaser or to a carrier as his agent. *McLeod v. J. E. Dilworth Co.* (1944), 321 U. S. —; *In re Globe Varnish Co.* (1940), 114 Fed. (2d) 916, aff'd. 312 U. S. 690.

Likewise, a tax on transfer of tangible personalty by inheritance can be levied solely by the state where such

tangibles have a physical situs at the time of such transfer. *Frick v. Pennsylvania* (1924), 268 U. S. 473. And a tax upon the use of tangibles must, of necessity, be laid by the state of physical situs at the time of such use. *General Trading Co. v. State Tax Com.* (1944), 321 U. S. —.

This principle would not, of course, affect an excise tax upon an activity not connected with the ownership of property such as the taxation of commissions of a selling agent not holding any interest in the goods. *Gwin, White & Prince, Inc. v. Henneford* (1938), 305 U. S. 434.

If this same reasoning be applied to the taxation of intangibles with a recognition of the fact that intangibles are considered to have a situs at the domicile of their owner, then the exercise of the right to sell such intangible or receive income from such sale is the exercise of a property right taxable at the situs of such intangible. The tangible personal property derives its situs from its physical location, whereas intangible personalty depends for its situs solely on the domicile of its owner, or from an established business situs. It is stipulated that appellant's domicile is in Indiana and that neither the appellant nor the estate of said Henry C. Starr, nor the appellant as Trustee, had or has a place of business at any point other than at Richmond, in Wayne Township, Wayne County, State of Indiana. (R. 17.)

III.

It would be futile, indeed, to dispute the well-established rule supported by the cases in Appellant's Brief and others that intangibles may be subjects of commerce between the states. It is possible to argue that Appellant's transactions in regard to his stocks and bonds did not constitute inter-

state commerce. Thus, in *Chicago Board of Trade v. Olsen*, (1922), 262 U. S. 1, 32, it was held that sales for future delivery on the Board of Trade in Chicago are not in and of themselves interstate commerce although they could be and were regarded by Congress from the evidence before it as directly interfering with interstate commerce. What was there said in regard to grain futures would apply equally to sales of other intangibles upon other markets.

However, invalidity of a tax is not established by merely showing that the tax is upon one of a chain of events which together constitute interstate commerce. As was said by this court in *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167, 177-8:

> "The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax upon its operations as such, is an interference. A tax upon property or upon a taxable event in the state, apart from operation, does not interfere."

Interstate commerce must bear its share of the tax burden along with intrastate commerce, but the state may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

It is not and cannot be claimed that the present tax discriminates against interstate commerce. It is levied equally and alike upon all sales of intangibles by a resident of the state whether such sales be entirely local in their execution or whether interstate commerce may intervene at some point in the chain of events. Nor can it be said that the tax is laid upon the operations in commerce as such. The tax is laid upon the receipt of money by a resident of

the state from the sale of property having situs within the state. In this respect, the sale of an intangible is more comparable to a sale of real estate than to a sale of tangible personal property. Assuming the existence of an interstate real estate exchange whereon a sale is made by residents of different states of a tract of unimproved land of which neither the buyer nor the seller takes actual physical possession and assuming that the deeds and other title papers pass by delivery from seller to buyer from one state to another in the mails, can it be denied that the state where the real estate is situated may tax the receipt by the seller of the money derived from such sale? Yet in that case as here the sole subject of the tax is the receipt of money from the sale of property having situs within the state. The situs of the property in each case establishes the situs of the property right which is taxed, such property right being the right to sell and receive the sale price of that property.

Thus, in *Rhode Island Hospital Trust Co. v. Doughton* (1926), 270 U. S. 69, 81, the court states:

> "In the matter of intangibles, like choses in action, shares of stock and bonds, the situs of which is with the owner, a transfer tax, of course, may be properly levied by the state in which he resides."

and in *Curry v. McCanless* (1939), 307 U. S. 357, 365:

> "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted

> through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. (Citations omitted.) Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership *or its exercise*—they cannot be disassociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities." (Italics supplied.)

It must be admitted that these cases arose under the due process clause and not under the Commerce clause, but it also must be conceded that they establish that the sale or other transfer of an intangible is, for the purposes of taxation, a local event within the state of the owner's domicile. Here the tax is levied upon that local activity apart from any operations in interstate commerce. It, therefore, falls within the description of those taxes which do not interfere with such commerce.

IV.

Appellant in his fourth sub-division of argument concedes that the situs of the securities here involved was at the place of his Indiana domicile, but, confusing his intangible rights with the tangible papers evidencing the rights, argues that the situs changed at the place where such papers were delivered.

The situs of an intangible is in no wise affected by the location of the physical evidence of the intangible rights. *Buck v. Beach* (1907), 206 U. S. 392, 402. In *Graves v. Schmidlapp* (1942), 315 U. S. 657, this court remarked:

> "Intangibles, which are legal relationships between persons and which in fact have no geographical location are so associated with the owner that they and their transfer at death are taxable at the place of his domicile, where his person and the exercise of his property rights are subject to the control of the sovereign power."

By a novation appellant's rights as a shareholder having a situs in Indiana were extinguished and new contractual rights having a situs elsewhere came into existence by the issuance of new stock certificates. The property right exercised by appellant, that is, the rights to receive and enjoy income from the securities, the right to liquidate them, the right to surrender ownership to another or to the corporation, the personal rights of the appellant which attach to his person and could not be disassociated from it, these personal rights were indissolubly bound to the appellant and to Indiana, the state of his domicile. They were enjoyed and exercised by the appellant under the protection of the laws of Indiana. Appellant, as Trustee, was an artificial legal creature of the laws of the State of Indiana. Aside from the laws of that state the trusteeship did not exist. Indiana taxes the exercise of these rights not through dominion over the property in regards tangible property but through dominion over the person which dominion is a local event within the state.

This court has very recently had occasion to distinguish between the local aspect of intangibles as contractual rights and the national aspect of those businesses which engage in interstate commerce in regard to those local contract rights. Thus, in *United States v. Southeastern Underwriters Association* (1944), 321 U. S. —, the court recognized the local character of insurance contract as such but never-

theless held that the business of trafficking in such contracts across state lines constituted interstate commerce subject to regulation by Congress. In the cases where this court has invalidated a tax upon interstate sales of goods, the taxpayer was, in each instance, the agency by which consumable and durable goods were distributed to the consumers. It was the agency for interstate distribution and the tax was laid upon such activities of distribution and thus was laid upon the interstate traffic. In the case at bar, the business of trafficking in stocks and bonds is conducted by brokers and this court has held that such business constitutes interstate commerce. It would seem that such a distinction between the national aspect of traffic in securities and the local aspects of the contractual rights which constitute the intangibles would not be affected by the technical consideration that the business of so trafficking in intangibles is conducted upon an agency basis rather than one of ownership. The very purpose and effect of this national organization for the purchase and sale of securities is to bring to the investor a market in his own locality where he can engage in the purchase and sale of securities. As a practical matter, the investor deals with his own local broker who is maintaining this local market. It is true that such local markets are geared to a few large markets of which the New York Stock Exchange is the largest but the entire brokerage system has grown up by reason of the necessity of establishing local markets and avoiding the necessity of having the investor do business directly and at long range upon metropolitan markets. The appellant placed orders in Indiana to sell from time to time the several stocks and bonds which he owned and he knew and intended that the same would be offered for sale according to the sales order, at the prices specified by him in his separate

sales orders. He was notified, as such Trustee, of the sale and endorsed and delivered to his broker in Indiana, the stock certificates or bonds so sold. He received the proceeds of such sale by check from his local broker in Indiana. (R., 19-20:31-32.)

The Congress has recognized that the national interests extend to those who are engaged in the business of trafficking in securities (U. S. Code, Title 15, Section 77 a, ff, Securities Act of 1933, Securities Exchange Act of 1933, Investment Companies Act). By exempting from their operation the transactions of the individual investor in the acquisition or the disposition of his investment it would seem that Congress has recognized the essentially local character of such transactions.

In the complexity of the ramifications of our commercial intercourse the distinctions between intrastate and interstate commerce offers no clearly defined line of cleavage. In each case, the necessity that the states be afforded an ample source of revenue and the necessity that the flow of national commerce be not impeded require that these considerations be balanced against each other. In *United States v. Southeastern Underwriters Association* (1944), 321 U. S. —, this court said:

> "In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

In view of the fact that the Congress after careful study and investigation has, by its action, indicated that

the national interests requiring regulation do not extend beyond those who furnish the markets, it is fitting and proper that this court, having no facilities for investigation and being not charged with the duty of such investigation, accept the judgment of that body.

This is especially true in this case where a judgment for the appellant would concentrate the power of taxation either in those very few states in which are located securities exchanges or in those very few states wherein the majority of those corporations issuing listed securities are incorporated. The national interests do not demand such a result. On the contrary, they condemn it. It cannot be said that a tax levied upon an investor by his own state, enacted by his representatives, and levied alike upon receipts from all of his securities whether listed upon an out-of-state exchange or not, will discourage his investment in such listed securities to the detriment of interstate traffic in such securities. It might well be said, however, that taxes levied by other jurisdictions where he is entitled to no representation of which he may have little or no knowledge would cause the investor to forego such investments and encourage him to invest locally, in which case he would have full knowledge of his ultimate tax burden to such an extent that he could compute his opportunities for profit.

Upon the basis of a balancing of national and local interests, it would appear that transactions of the individual for the purpose of investment or speculation be viewed as separate and apart from the traffic in interstate commerce conducted by the stock exchanges and the brokerage or organizations. Investment of and speculation with one's capital is essentially a local activity, separate and distinct

from commerce and the liquidation of an investment whether such liquidation be by sale or redemption is just that and no more. National interest does not require that such private investment be exempted from the control of the states.

CONCLUSION

Both from the standpoint that the sales of securities upon which appellant paid tax were sales of intangibles having a situs within Indiana and from a practical balancing of national and local interests, the conclusion of the Supreme Court of Indiana in this cause was correct and its judgment should be affirmed.

Respectfully submitted,

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APPENDIX 1

Appellant in his Appendix A, pages 44 and 45 omits from Section 1(m) of the Indiana Gross Income Tax Act the following proviso which is believed to be pertinent:

> "Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are reecived from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of 'gross income' any receipts of a taxpayer received as interest or dividends, or from sales, or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal remuneration of any kind or character received by any taxpayer."

APPENDIX 2

INDIANA SUPREME COURT

No. 27881

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA,

Appellant,

v.

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,

Appellee.

October 25th, 1943.

SHAKE, J. During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income Taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

> "5. The sales of the above described corporate stocks and bonds were twenty separate sales made

from time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and

Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds according to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said

bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commission. All of said sales were handled in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay. *O'Kane v. State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. *Dept. of the Treasury v. Allied Mills, Inc.* (1942), — Ind. —, 42 N. E. (2d) 34, affirmed by the United States Supreme Court February 15, 1943, — U. S. —, 87 L. Ed. —, 63 Sup. Ct. 666. *J. D. Adams Mfg. Co. v. Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "*mobilia sequuntur personam*"—the situs of the property is the domicile of the owner. This doctrine maintains, generally in the absence of a statute or of peculiar facts forcing a different conclusion. Cooley, Taxation (4th Ed.), § 440. *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36. *Buck v. Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732. *Blodgett, Tax Commissioner of the State of Conn. v. Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410. *Croop v. Walton* (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386. No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see *Miami Coal Co. v. Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership, and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until owner-

ship passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidentally involved interstate commerce is immaterial. *Holland Furnace Co. v. Dept. of Treasury* (1943), — C. C. A. —, 133 F. (2d) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid. *Curry v. McCanless* (1939), 307 U. S. 357, 83 L. E. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162. *O'Kane v. State, supra.*

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLEE'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CASE

and

ADDITIONAL PROPOSITIONS, POINTS AND AUTHORITIES

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IN THE

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October Term, 1946

No. 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,

Appellee.

APPELLEE'S BRIEF ON QUESTIONS PROPOUNDED FOR REARGUMENT OF CASE

and

ADDITIONAL PROPOSITIONS, POINTS AND AUTHORITIES

This case is before the Supreme Court of the United States on appeal from the Indiana Supreme Court. Oral argument (Summary Docket) was made before the Court

by both parties on November 8, 1944. No decision was made or rendered by the Court on that argument.

In the interim,[1] this case was restored to the docket on June 18, 1945 for reargument in its Journal for October 8, 1945, the Supreme Court of the United States propounded three questions to counsel, and directed that briefs and arguments be addressed thereto.

Statement of Record

The Appellant in its brief on the questions propounded for reargument of the cause, states portions of the record at pages 1, 2 and 3 of its brief. These abstract statements from the record, insofar as they go, are fairly and accurately stated. However, the Appellee points out three statements not stated in Appellant's brief, which could have a direct bearing upon the situs of the sale in this case, which statements are as follows:

> "• • • The trustee placed orders (twenty order transactions) to sell from time to time, of the several stocks and bonds • • • with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a

1. Since the argument before this Court, Gath P. Freeman, Trustee under the Will and of the Estate of Henry G. Starr, deceased, and also attorney of record for appellant, died on June 4, 1946. Thereafter, Almira G. Freeman, widow of Gath P. Freeman, was named successor trustee. On July 20, 1946, the successor trustee, Almira G. Freeman, was approved by the Circuit Court of Wayne County, Indiana, and is now the duly acting and qualified successor trustee. A motion for substitution has been presented and filed in this Court.

The Appellee recognizes the motion, offers no objection and acknowledges notice of such substitution. Appellee also takes notice of change of attorney for the Appellant from Gath P. Freeman to Harry P. Ice, of Ross, McCord, Ice and Miller, Indianapolis, Indiana.

stock and bond brokerage business at and in said City of Richmond, Indiana." (R., p. 19.)

"* * * The trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner & Beane, brokers at and in the City of New York of the State of New York and by them placed and offered on said New York Stock Exchange." (R., p. 20.)

"* * * Nor did the Trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms or corporations resident in states other than Indiana." (R., p. 21—Last clause in sentence—Stipulation No. 5.)

Appellee's Answer to Appellant's Discussion of "The Basis of the Tax".

Before answering the three questions propounded by the Court, which are later discussed on pages 9 to 16, we wish to answer the Appellant on the subject-matter in his brief designated as "The Basis of the Tax". (Pages 4-6, Appellant's Brief.) The Appellant raises anew the question as to what type of tax the Indiana Gross Income Tax is. We think the question as to the type, basis, effect and application of this tax has long been settled by both the Indiana Supreme Court[2] and the United States Supreme Court."[3]

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2. "We conclude that the tax in question is an excise levied upon those domiciled within the state or who derive their income from services within the state upon the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of the right to receive income from within, or transact business under the protection

In its comment upon the type of this tax, this court said in the Adams case:[3]

> "The regulation issued by the Department of Treasury pursuant to authority granted by the act treat the exaction as a gross receipts tax, and the Attorney General says in his brief that it is a privilege tax upon the receipts of gross income. We think this is a correct description."

And further said:

> "We conclude that the tax is what it purports to be, a tax upon gross receipts from commerce."

However, we respectfully suggest that the tax is more than a tax upon "gross receipts from commerce", for the reason that in its practical application it touches *all* gross receipts from *all* persons, some of whose receipts may not be from "commerce" at all in the generally accepted definition of the word "Commerce".

The Division's analysis of the Act has not been changed in its later Regulations. A discussion of the "Basis of the Tax" in the 1946 Regulation, quoted by Appellant (pages 4-5, Appellant's Brief) reveals no difference in tenor and

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of the state. We feel that the weight, reason and authority sustains this view." (Pages 172, 188.)

"The law is intended to be general and to operate on all residents of the State and all who derive revenue from sources within the State."

Miles v. Dept. of Treasury (1935), 209 Ind. 172; 298 U. S. 640; 209 Ind. 172; 199 N. E. 372.

3. *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 311.

effect between the analysis of 1946 and that published in the Regulations twelve years before (1934).[4]

We submit this comment to the Court as an answer to any inference which the appellant may imply that the nature or type of the Indiana Gross Income Tax Act effects, either directly or indirectly, the main question herein, i. e. Interstate commerce immunity, since it is undeniable that neither the nature of the tax nor the Court's analysis of it has been changed by legislative act or court decision. The question of the type or basis of this tax has been fully and

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4

GROSS INCOME TAX REGULATIONS.

Issued: July 1934.
Revised: Dec. 31, 1935.

ARTICLE 2

GENERAL SCOPE AND APPLICATION OF TAX.

"The GROSS INCOME TAX ACT of 1933 is primarily and in effect a gross receipts tax applying to the gross receipts of every taxpayer under the Act from all sources without allowances or deductions for costs, expenses or dependents, and is, therefore, in no way a net income tax. It applies to income from sales of all kinds of property or commodities in business and in this case is measured by the gross income derived from such sales. In this respect and to this extent it operates as a sales tax. There are not two separate and distinct laws in Indiana—that is, a gross income tax and a sales tax—but whatever elements of a sales tax there might be are embodied in and made a part of the gross income tax law."

4

GROSS INCOME TAX REGULATIONS

Approved: April 27, 1946.
Preface: Type of Tax.

"TYPE OF TAX. The Indiana Gross Income Tax is, in reality, a gross receipts tax. The coverage is the widest possible since the entire amount of gross receipts of taxpayers is used as a base. It is not a sales tax even though it applies to receipts from sales. It is not, however, imposed upon the act of sale but upon the receipts from sales when such income is received or credited. It is not an occupation tax because it is applied to every individual, group or firm without regard to the occupation thereof."

"It is not a consumer's tax because the act has no provision for passing the tax on as a separate chargeable item nor would such a provision be valid. (Opinion of Attorney General of Indiana, August 21, 1934)."

fairly determined and accepted by this Court in its consideration of eleven other cases involving this tax in interstate commerce matters, heretofore presented for the Court's consideration.[5]

Furthermore, the statement of appellant in his brief on reargument, on page 5, that "the court may disregard all argument predicated upon the proposition that this is a tax on the privilege of domicile, or any other privilege measured by gross income" is wholly presumptuous and minimizes decisions of the Courts which have heretofore held this to be a tax upon the privilege of receiving gross income.[6]

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5. *J. Harry Miles v. Department of Treasury of Indiana* (1935), 298 U. S. 640; 209 Ind. 172; 199 N. E. 372; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; 212 Ind. 344; 7 N. E. (2d) 941; *Wood Preserving Corp. v. Department of Treasury* (1941), 313 U. S. 62, 114 Fed. (2d) 922; *Ingram-Richardson Mfg. Co. v. Department of Treasury* (1941), 313 U. S. 252; 114 Fed. (2d) 889; *Allied Mills v. Department of Treasury* (1942), 318 U. S. 740, 220 Ind. 340; 42 N. E. (2d) 34; *Holland Furnace Co. v. Department of Treasury, Great Lakes Dredge & Dock v. Department of Treasury; Interstate Roofing & Supply v. Department of Treasury, Fitz-Simons & Connell Dredge & Dock v. Dept. Treasury* (1943), 320 U. S. 746; 133 Fed. (2d) 212; *Ford Motor Co. v. Department of Treasury* (1944), 323 U. S. 459; 141 Fed. (2d) 24; *International Harvester Co. v. Department of Treasury* (1944), 322 U. S. 340; 221 Ind. 416; 47 N. E. (2d) 150.

6. *J. Harry Miles v. Department of Treasury of Indiana* (1935), 298 U. S. 640; 209 Ind. 172; 199 N. E. 372; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; 212 Ind. 344; 7 N. E. (2d) 941.

Appellee's Answer to Appellant's Discussion of the Matter of Property Tax Collections and Intangible Tax Collections in Relation to Gross Income Tax Collections.

In addition to the above comment on the "Basis of the Tax", we also wish to comment on the Appellant's statement relating to the amount of 'property tax' and 'intangible tax' collections in the State of Indiana and to point out that the figures which would present a true comparison are not shown or quoted. The property tax collections for the years 1930, 1931, 1932 and 1933 when compared to the year 1934, reveal that there was a substantial reduction.[7]

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7. NET RECEIPTS FROM PROPERTY, INTANGIBLE, AND GROSS INCOME TAXES.*

For the Fiscal Year Ending: ***	Net Receipts Property Tax	Intangible Tax Net Receipts	Net Receipts Gross Income Tax	Closing Cash Balances **
Sept. 30, 1931, p. 91.	$143,438,784.71	None	None	
Sept. 30, 1932, p. 71.	135,421,445.18	None	None	
June 30, 1933, p. 130.	112,386,878.08	$ 633,889.67	$ 1,744,547.08****	
June 30, 1934, p. 9.	87,437,220.88	1,284,360.66	10,388,014.99	
June 30, 1935, p. 9.	95,575,961.18	1,085,571.21	13,607,836.05	
June 30, 1936, p. 7.	93,145,960.32	1,326,704.97	16,548,477.91	
June 30, 1937, p. 7.	99,688,926.18	1,507,312.42	20,556,656.33	
June 30, 1938, p. 7.	98,309,512.97	1,356,916.25	22,339,541.47	
June 30, 1939, p. 7.	99,473,099.05	1,251,282.53	19,981,967.58	
June 30, 1940, p. 7.	100,303,087.36	1,337,519.87	23,538,224.85	
June 30, 1941, p. 7.	105,421,704.10	1,534,179.97	25,872,790.17	
June 30, 1942, p. 7.	107,145,956.02	1,898,540.49	33,601,197.45	
June 30, 1943, p. 7.	108,729,685.30	1,496,981.30	34,116,866.36	
June 30, 1944, p. 7.	104,162,100.08	1,358,116.50	40,703,468.42	
June 30, 1945, p. 7.	111,079,966.40	1,408,308.25	46,157,549.79	

* Extracted from the Annual Statistical Reports of the State of Indiana, compiled by the State Board of Accounts. (Page reference are to statistical Reports.) Appellee's figures, in many instances, are less than corresponding

For the years subsequent to 1934, it is true that property tax has increased as shown by the Appellant's figures, but the property tax has not in any year reached the 1932 figure of $135,421,445.18. It is, of course, inevitable that the increased financial needs of the units of state government frequently necessitate increases in property tax assessments, but such increases are in every case held down by the amount of gross income tax annually distributed to these units. In other words, were it not for the distribution of the revenue collected by the gross income tax, the annual increase in property tax shown by the tables would, in every case, have been greater.

However, with respect to appellant's discussion of the economic effect of this tax upon the other state taxes, we believe that this subject is of no moment in relation to the main question in this cause, to wit: Interstate commerce immunity of intangibles.

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figures of Appellant, because Appellee's figures are *net*, after the deduction of refunds paid.

** Appellee neither sets out closing Cash Balances, nor accepts Appellant's figures in regard thereto, because (1) closing cash balances are not a true index of the financial status of Indiana for the reason that the cash balance presented in Appellant's Brief, reflects the financial status prior to payment of obligations and prior to the beginning of a new fiscal year, and, (2) the financial condition of Indiana is wholly irrelevant and immaterial to the issues of this case.

*** Appellant's Tax Table (p. 7 of Appellant's Brief on Questions Propounded for Reargument of Cause) is misleading, incomplete, and of no value in deciding the issue, because it does not show nor compare property tax receipts for years prior to the enactment of the Gross Income Tax Act in 1933.

**** Collections for May and June, 1933, at the inception of the Gross Income Tax Act; this figure taken from Year Book of the State of Indiana 1934, at p. 388.

THE QUESTIONS PROPOUNDED BY THE COURT

PROPOSITIONS, POINTS AND AUTHORITIES

Questions propounded by the Supreme Court of the United States:

1. WERE THE SALES OF SECURITIES AS MADE IN THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE TRANSACTIONS UPON THE NEW YORK STOCK EXCHANGE, INTERSTATE SALES WITHIN THE MEANING AND APPLICATION OF ADAMS MFG. CO. v. STOREN, 304 U. S. 307; OF McGOLDRICK v. BERWIND-WHITE COAL MINING CO., 309 U. S. 33, 58?

PROPOSITION NO. 1

(Directed to Court's Question No. 1)

The sales of these securities as made in the circumstances of this case, including the transactions upon the New York Stock Exchange, were not interstate sales within the meaning and application of the cases mentioned in the question. Intangible personal property requires consideration of a rule entirely different from the rules applicable to tangible personal property.

In this case, interstate commerce was only incidental, while in the J. D. Adams Mfg. Co. v. Department of Treasury, and the McGoldrick v. Berwind-White cases, the mobile situs of the tangible property called for a different reasoning.

The answer of Appellee to Question No. 1 is "No."

Point 1

The sale of securities in this case is not within the interstate commerce immunity, within the meaning and application of *J. D. Adams Mfg. Co. v. Storen; of McGoldrick v. Berwind-White Coal Mining Co.* The transactions involving intangibles are subject to different rules from the rules applicable to tangible personal property.[8]

Point 2

The property concerned in the *J. D. Adams Mfg. Co.* and the *McGoldrick cases* was tangible personal property capable of acquiring a situs in another state through the channels of interstate commerce *prior* to sale. In this case, the situs of the intangible property remains at the domicile of the seller (owner) until *after* the sale. This is a distinction which creates a difference.[9]

Point 3

The interstate commerce feature in this case is confined to transportation of the securities, which is only incidental and subsequent to the sale.[10]

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8. *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33; *Curry, State Tax Comm. etc. v. McCanless, Comm.* (1939), 307 U. S. 357; *Graves, et al. v. Elliott, et al.* (1939), 307 U. S. 383; *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83.

9. *Graves et al. v. Elliott, et al.* (1939), 307 U. S. 383; *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83; *Hatch v. Reardon* (1907), 204 U. S. 152; *Hall v. Geiger-Jones* (1916), 242 U. S. 539-558 (and cases cited there not in disaccordance); *Blodgett v. Silberman* (1928), 277 U. S. 1, 10; *Buck v. Beach* (1907), 206 U. S. 392-402.

10. *Ingram-Richardson* (1941), 313 U. S. 252; *McLeod v. Dilworth* (1944), 322 U. S. 327; *Hall v. Geiger-Jones* (1916), 242 U. S. 539-558.

Point 4

Neither the purchaser's state, nor the state which contains the Exchange Mart, could impose a tax upon the Appellant's gross receipts for the reason that the intangibles had acquired no business situs in such states, which would provide the only legal basis for a tax upon such gross receipts. In the absence of a business situs it is conclusive that the situs was the domicile of the owner.[11]

Point 5

The sale of these securities by the Appellant created a debt due him, which was taxable to him at his domicile.[12]

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2. Does the commerce clause forbid Indiana to levy gross income tax upon the transactions in question in the absence of any showing that a similar or substantial tax is, or may be in fact, laid upon them by any other state?

PROPOSITION NO. 2

(Directed to Court's Question No. 2)

The Commerce Clause of the Constitution does not bar a state from imposing a tax upon subject-matter under its jurisdiction in cases where such subject-matter is not burdened by the exactions of other states to the extent that interstate transactions would bear a heavier tax than that imposed upon local intrastate transactions. Furthermore,

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11. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491.

12. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491.

there is no rule of immunity against double taxation of intangibles. Even had the record shown in this case that a similar or substantial tax was in fact laid upon these securities by any other state, the Commerce Clause would not bar Indiana from levying a gross income tax.

The answer of Appellee to Question No. 2 is "No."

POINT 1

Interstate commerce should not be relieved from bearing its share of local tax burdens to the extent that they are borne by intrastate commerce. A forbidden burden does not exist unless a tax lends itself to a compounding of a burden greater than that imposed on intrastate transactions.[13]

POINT 2

The record herein does not show that any tax of a "similar" or "substantial" nature was imposed upon the appellant's gross receipts by any other state.[14] Even were a "similar or substantial" tax imposed by another state upon the receipts from the sales of these intangibles, such a circumstance would not bar or preclude Indiana's right to impose this tax. There is no longer any rule of immunity against double taxation of intangibles by the several states.[15]

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13. *International Harvester Co. v. Department of Treasury* (1944), 322 U. S. 340-349; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 46, 48.

14. Record: Stipulation and Evidence, Pages 12-21.

15. *State Tax Commission of Utah v. Aldrich et al.* (1942), 316 U. S. 174, 179; *Ft. Smith Lumber Co. v. Ark.* (1920), 251 U. S. 532, 533; *Cream of*

Point 3

Local transactions of this nature, where the seller and purchaser are both in Indiana, must bear this tax without question.[16]

Point 4

The interstate communication and transportation between the buyer and seller could not, of themselves, warrant or justify any other state imposing a tax upon the gross receipts of the seller.[17]

Point 5

The tax imposed upon the appellant in this case, created no discrimination against either interstate or intrastate commerce, nor did it place either at a competitive disadvantage.[18]

Point 6

The New York State Transfer Tax, even though it may have been exacted from the Appellant; is not to be considered as one of compounded or multiple taxes to the extent

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Wheat v. Grandforks (1920), 253 U. S. 325; *Ill. Central R. R. Co. v. Minn.* (1940), 309 U. S. 157, 164; *Kidd v. Ala.* (1903), 188 U. S. 730.

16. Sec. 3 (g) Indiana Gross Income Tax Act; Regulation 3500 Series VI, Rule 7; Regulation 4100, Series VII, Rule 7. (Also see foot note 25.)

17. *Ingram-Richardson, Mfg. Co. v. Dept. Treasury* (1941), 313 U. S. 252; 114 Fed. (2d) 889; *Western Live Stock et al. v. Bureau of Revenue* (1938), 303 U. S. 250, 258, 260; *Hall v. Geiger-Jones* (1916), 242 U. S. 539, 558.

18. Virginia Law Review, Vol. 26, p. 1938.

that it constitutes a vice of double taxation, for the reason that such tax is neither "similar nor substantial."[19]

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3. TO WHAT EXTENT, IF ANY, IS INDIANA'S POWER TO TAX THE GROSS RECEIPTS FROM THESE TRANSACTIONS AFFECTED, UNDER THE COMMERCE CLAUSE, BY THE FACTS THAT DOMICILE OF THE SELLER OR SITUS OF THE SECURITIES PRIOR TO THE CONCLUSION OF THE SALES WAS IN INDIANA?

PROPOSITION NO. 3

(Directed to Court's Question No. 3)

That fact that the domicile of the seller and situs of the securities prior to and at the time of sale was in Indiana, fortifies and insures Indiana's power to levy a tax upon the seller's gross receipts from this type transaction. The rule of mobilia sequuntur personam prevails.

The answer of Appellee to the Court's Question No. 3 is, therefore, that domicile and situs do have a material effect

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19. New York State Law, Article 12, Sec. 270, Thompson's Laws of New York, CL New York, provides that the rate of transfer tax shall be 3c on each share sold for less than $20.00, and 4c on each share sold in excess of that amount. A comparative example is as follows: 100 shares, selling price $100.00 each, would compute a gross income tax of $100.00 under the Indiana law. The New York tax, if leviable, would be $4.00.

A New York Transfer Tax is in no way similar to the Indiana Gross Income Tax for the reason that under the former it is not necessary that a sale occur; it attaches when title passes, even though the transfer is purely a gift, bequest or inheritance. It has no relation to the gross receipts of the seller except to the maximum of $20.00. It is not a tax upon receipts, nor the privilege of receiving them. It is, instead, a tax upon a physical act—the act and privilege of transferring title on the books to intangible property and of thus using the facilities of the New York Stock Exchange.

upon the application of the Indiana Gross Income Tax Act in this case.

Point 1

The rule of mobilia sequuntur personam, while a common-law rule, has been sustained by this Court and must be regarded as settled.[20]

Point 2

The sovereign State of Indiana, having control and jurisdiction over the appellant and his securities, had adequate constitutional basis for imposing this tax.[21]

Point 3

Under the general principles of taxation, intangibles are taxable at the domicile of the owner and not elsewhere.[22]

Point 4

The lack of a "business situs" elsewhere forces the conclusion that the situs of these intangibles was at the domicile of the owner.[23]

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20. *Blodgett v. Silberman* (1928), 277 U. S. 1, 9 and 10; *Graves v. Schmidlapp* (1942), 315 U. S. 657-660.

21. *M'Culloch v. Maryland* (1919), 4 Wheat. 316-429; *Curry v. McCanless* (1939), 307 U. S. 357; *Graves v. Elliott* (1939), 307 U. S. 383; *Graves v. Schmidlapp* (1942), 315 U. S. 657-660.

22. *Kirtland v. Hotchkiss* (1879), 100 U. S. 491, 497, 498 and 499.

23. *Safe Deposit & Trust Co. v. Virginia* (1929), 280 U. S. 83-92; *Wheelock-Lovejoy & Co. v. Gill* (1937), 366 Ill. 378; 9 N. E. (2d) 58; *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 436; *Wheeling Steel Corp. v. Fox, et al.* (1936), 298 U. S. 193-197.

Point 5

These intangibles are nothing more than constituents of title and evidences of ownership of interest in corporate property. The removal of stock certificates from one stock to another does not change the actual situs of the physical corporate assets which they represent.[24]

Point 6

The State of Indiana, through its Gross Income Tax Division (Department of Treasury) in the absence of any showing of "business situs" applies the rule of mobilia sequuntur personam consistently, equally and alike to both residents and non-residents.[25]

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24. *Hatch v. Reardon* (1907), 204 U. S. 152-161.

25. "ARTICLE 39. REGULATION 3904. INTANGIBLES OWNED BY NON-RESIDENTS. The Gross Income Tax Division applies the rule of *mobilia sequuntur personam* (the situs of the intangible is the domicile of the owner) as to income received from the sale of intangibles; interest or dividends thereon; or receipt of distributions thereon in dissolutions of corporations. Therefore, the tax will not apply to the income of non-residents received from such sources. (Series VII (1946) Gross Income Tax Regulations.)

"ARTICLE 41. REGULATION 4100. RESIDENTS OF INDIANA—RULE 7. SALES OF INTANGIBLE ASSETS. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property, even though the sale is made outside the state. This will include receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations. This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. (Series VII (1946) Gross Income Tax Regulations.)

ARGUMENT

This case presents two questions for determination by this Court:

1. Whether or not the sale of securities between residents and non-residents of the State of Indiana, whereby the telegraph, mail and the services of a foreign mart are used, constitutes an interstate transaction immune from taxation within the meaning of the Federal Constitution, and

2. If we are to assume that the foregoing transactions are transactions in interstate commerce, then does the application of the Indiana Gross Income Tax Act burden, regulate, interfere with, or discriminate against such commerce contrary to the Commerce Clause of the Federal Constitution?

The Appellee contends that there are no constitutional reasons for prohibiting Indiana from imposing the gross income tax upon the gross receipts derived from the sale of securities in this case.

The situs of these intangibles was at the domicile of the owner in Richmond, Indiana, and remained there until *after* the sale was completed. The transportation of the securities to New York thereafter was not the "very essence of sale" as the Appellant says. It was incidental and involved interstate commerce only as to *transportation* after the sale was made.

The Appellant has, to a great extent, built his case upon the foundations of the J. D. Adams decision.

We think that it does not apply in the present case for the very obvious reason that in legal principles there is a

tremendous difference between tangible and intangible property. The former is capable of acquiring a situs in another state prior to sale and entering into competition with other tangible property upon its arrival there. Intangible property retains its situs at the seller's domicile until it acquires a definite new one. Furthermore, intangible property is not a competitive thing which competes with local trade. Any favorable inclination toward the "state of market" would, therefore, be inappropriate here.

The theme of the J. D. Adams decision is that the risk of taxation by the state of destination innoculates this tax with "vice". But we submit that the mere fact that the state of destination may impose a tax upon gross receipts from the sale of *fangible* property does not command the conclusion that such state may levy such a tax upon the receipts from the sale of *intangible* property sold by a resident of another state. Were the state of destination to attempt such legislation, the taxpayer (seller) in the state of departure would lose no time invoking the rule mobilia sequuntur personam and the decisions thereupon.

Where intangible property is concerned we do not think it possible that the "risk" or "vice of multiple taxation", can be invoked even were a mere and unmaterialized risk of multiple taxation a sound reason for nullifying a tax imposed by the state of the seller. In *Int. Harv. v. D. of Treas.* this court held that where the record shows no tax on the same event the mere possibility of such will not invalidate the tax already levied.

We also suggest that a difference in the shipping arrangements of the J. D. Adams Mfg. Co. might bring its transactions within the reach of the Indiana Gross Income Tax. For, had that Company placed its machinery upon

a common carrier F.O.B. Indianapolis, Indiana, the sale would have been completed in Indiana and subject to the Indiana tax as well as a Use Tax in the state of destination.[26] In this case the placing of the securities in the U. S. mails was analogous.

In the McGoldrick-Berwind-White case, the Court said:

> "The ultimate burden of the tax both in form and substance is thus laid upon the buyer for consumption of tangible personal property * * *. It is conditioned upon events occurring within the State * * *."

In its meaning and application, therefore, it is unlike an excise tax levied by the state of the seller. We do not think that the reasoning of the Berwind-White decision would permit the state of the buyer to levy a tax upon the gross receipts from the sale of securities, because of the same facts pointed out heretofore, namely: that tangible property is capable of acquiring a situs for sale in a state other than that of the seller, while in the case of intangible property, such a circumstance is not present except in instances where "business situs" is concerned.

While we realize that "*mobilia sequuntur personam*" is a common-law maxim and has often been subjected to the accusation that it is a mere fiction, yet no longer ago than 1928, this Court said its application must be accepted as settled.[27] With the exception of the "business situs" cases, we know of no instance where it has ever been modified or limited. It must be accepted in the absence of any ruling

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26. *McLeod v. Dilworth*, (1944), 322 U. S. 327.

27. *Blodget v. Silberman* (1928), 277 U. S. 1, 9, and 10.

or statute to the contrary, unless "business situs" in another state is actually a fact.[28]

In this case, these securities were offered for sale. The offer to sell preceded the offer to buy, but, once offered and the purchaser's acceptance taken, the essence of the sale was complete, and the rule of the New York Stock Exchange became effective.[29] The "State of occurrence" is Indiana.

The "business situs" cases hold that intangibles can be taxed at a situs other than domicile of the owner. This is taken to mean that New York, or any other state, could have taxed these intangibles if they had acquired a "business situs" there. But they did not acquire such a situs. It is not contended that they did. Since they must have a situs somewhere, the conclusion must be that their only situs was the domicile of the owner until after the sale was completed and their situs then became the domicile of the new owner.

True, some of the mechanical features of the sale transpired in New York City at the Exchange, but that fact does not change the circumstance that the situs of the securities remained at Richmond, Indiana, until transportation to New York became necessary. Up until the time of the completion of the sale, these securities were under the jurisdiction of the sovereign state of Indiana and an intangible tax could be imposed upon them, and the state retained this right until the sale was completed to some new owner or his broker, located in some state.

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28. *Curry v. McCanless* (1939), 307 U. S. 357; *Wheelock-Lovejoy & Company v. Gill* (1937), 366 Ill. 378; 9 N. E. (2d) 58, 59.

29. Rule 116, N. Y. Stock Exchange. "All bids made and accepted, and all offers made and accepted, in accordance with Rules 100 to 136, inclusive, shall be binding."

The fact that there is in the United States a large Mart for the exchange of securities, drawing its business from all states, territories and, in fact, from every country in the world, should not operate to place any other state at a disadvantage in taxation, nor lend itself to the compounding of an immunity which would reach to every state in the Union.

The business of the New York Stock Exchange involves the sale of hundreds of thousands of securities every business day. Certainly some of these securities are sold by Indiana owners. It also certainly must be possible that some of the purchasers of the stock of Indiana owners are occasionally Indiana persons. But would the fact that the stock of an Indiana owner found its way to a *new* Indiana owner through the medium of the New York Stock Exchange, make it an interstate transaction? If so, how could such a transaction be distinguished from an "over-the-counter" sale through the medium of a local dealer in securities? Would the mere fact that a telegraph message which conveyed the offer to sell took a trip from Indiana to New York City, and a message conveying the offer of acceptance took a trip from New York City to Indiana, suffice in itself, to brand this an interstate commerce transaction and bar Indiana from taxing receipts therefrom? We think not. The principles of taxation must comprehend something more fundamental than physical acts. So must the principle of interstate commerce immunity. If not, then there is indeed an exaggeration of the importance of "mechanical and artificial distinctions" and an unwarranted intrusion upon the real and basic reasons for interstate commerce immunity.

No longer can interstate commerce be regarded as an inviolate sanctum which may not ever be invaded just because it is interstate commerce. Such a theory, if it ever

was actually considered by the Court, has been abandoned. Recent cases[30] held that the Constitutional inhibition against burdening interstate commerce means that the inhibited burden does not refer to a single tax imposed by one state, but rather to more than one tax imposed by different states, which combination would result in interstate commerce bearing a greater burden than that which intrastate commerce is forced to bear. Even as far back as 1919 this court enunciated, and has since reiterated, the theory that interstate commerce must pay its own way and bear its share of state tax burdens.[31]

It has not been shown that this tax unduly burdens the Appellant; that it discriminates against the commerce; that it interferes with or interrupts it; or that it regulates it in any manner whatsoever. These are the true constitutional tests of immunity. There must be one of those basic elements present in every case if a state is to be barred from imposing a tax which it has chosen to be a part of its system of taxation for raising the revenue necessary for its existence.

The only straw of multiple taxation at which the Appellant can grasp in this case, is that the New York Transfer Tax was paid, or might have been paid[32] as a consequence of this sale. But the New York Transfer Tax, in nature and effect, is far different from a tax upon the gross receipts of the seller.

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30. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33; *International Harvester Co. v. Dept. of Treasury* (1944), 322 U. S. 340.

31. *Postal Telegraph & Cable Co. v. City of Richmond* (1919), 294 U. S. 252-59; *Gwin-White & Prince v. Henneford* (1939), 305 U. S. 434; *McGoldrick v. Berwind-White* (1940), 309 U. S. 33; *Western Live Stock v. Bureau of Rev.* (1938), 303 U. S. 250.

NOTE: Nothing in the record that shows payment.

Such tax does not even have any relation to gross receipts where the selling price is $20.00 or more. The transfer tax does not use the gross receipts of the seller as its measure, but only a limited maximum of the selling price of a share of stock. It is a tax solely upon an act—the act of transferring beneficial interest in the legal title to shares and certificates—and it becomes due immediately upon the doing of that taxable act. It is an excise tax upon the transfer.[33] In fact, it is not even necessary that a sale occur or receipts be obtained in order for the transfer tax to attach. It attaches even though the transfer was a gift, a bequest or inheritance.[34]

So far as it being a "substantial tax" is concerned, we present an example wherein 100 shares of stock are sold for $100.00 each—selling price therefor is $10,000.00. The Indiana Gross Income Tax on this transaction would be $100.00.[35] If such a sale were to escape the Indiana Gross Income Tax but be forced to pay the New York Transfer Tax, the total tax payable would be 4c times 100 shares, or only $4.00.[36] A tax so inconsequential by comparison, should

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33. Cooley Taxation, Vol. 4 (4th Ed.), page 3494, Sec. 1764.

"The section imposes the tax upon all agreements or instruments for the transfer of shares of corporate stock. It is in the nature of an excise tax on the transfer."

U. S. Radiator Co. v. State of N. Y. (1913), 208 N. Y. 144; 101 N. E. 783;

Arden Farms Co. v. State (1946), 60 N. Y. S. (2d) 47, 49.

34. Ruling of New York Tax Commission, Article 14 (CCH N. Y., Vol. 2, p. 6311).

35. Sec. 3(g) Indiana Gross Income Tax Act 1937 as amended; Burns' Indiana Statutes, § 64-2603.

36. New York Stock Transfer Law. Thompson Laws of New York, Sec. 270, Art. 12.

not be permitted to inveigh against multiple taxation inhibitions even had the record shown that it was paid.

In this case, the Indiana tax does not result in discriminatory taxation against interstate commerce, nor does it place such transactions in unequal and unfair positions with other transactions locally completed. Our analysis of this Court's interpretation of the Constitution of the United States and its relation to commerce between the states, is that such inhibitions encompass only the burdening of the commerce, regulation of it, interrupting it, discriminating against it and interfering with it. Just because a tax is imposed upon receipts from a transaction which may happen to have incidental interstate commerce attributes, it by no means follows that any of the elements of prohibition named have been trespassed against.

We recognize that the sales of securities may be a proper subject of interstate regulation because of the means which are used to complete the sales, namely, mail, telegraph, telephone and other means of communication and transportation. We think that is as it should be, but that fact has no bearing upon the legality of a tax imposed on *receipts from sales* of intangibles even though they may be proper subjects of interstate commerce *regulation*. Local transactions must pay this tax without question and without the hope of appeal to the haven of interstate commerce immunity, be that haven an abstract theory or a concrete thing. Certainly the Constitution never intended that interstate commerce transactions should go wholly free from tax and thus wholly escape their share of the local burdens of government. The Constitution is not one-sided. It would fail in its purpose if it permitted interstate commerce immunity to discriminate against commerce that is wholly local, as well as protecting interstate commerce from dis-

crimination. In the early and formative stage of the Union it may have been necessary that commerce between the states be subjected to rigid rules, but in the present times it would be inconsistent with national unity and detrimental to the states, for transactions to wholly escape tax for the sole reason that they are interstate. This would mean that in the plan of a union of states, the mere fact that incorporeal boundry lines separate one state from another, would operate to place *local* transactions at a competitive disadvantage. Naturally, distinctions of jurisdiction are necessary, but this fact should not engender situations where local transactions are forced to pay a tax but identical ones in interstate commerce pay either none at all, or one so infinitesimal that the inequality still remains.

We do not believe that the Appellant has presented in any of his brief sufficient reasons for reversing the decision of the Indiana Supreme Court in this case.

We further believe that of all the cases involving the Indiana Gross Income Tax and its relation to interstate commerce which this Honorable Court has heard and decided, this case presents the least basis of immunity.

Therefore, the decision of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 3

ALMIRA G. FREEMAN, as Successor Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant,

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

MOTION FOR LEAVE TO FILE AND BRIEF AND PETITION ON BEHALF OF THE STATES OF CALIFORNIA, CONNECTICUT, FLORIDA, KENTUCKY, MAINE, NEVADA, NEW MEXICO, NORTH DAKOTA, UTAH, WASHINGTON, AND WEST VIRGINIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

ALMIRA G. FREEMAN, as Successor Trustee under the Will and of the Estate of Henry C. Starr, Deceased,
Appellant;

v.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana,
Appellee.

No. 3

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Come now the undersigned, and move the Court that leave be granted to file a Brief as Amici Curiae in the

above entitled cause, pursuant to Rule 27 (9) of the Supreme Court of the United States.

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STATEMENT OF THE CASE

As stated in the majority opinion "This case presents another phase of the Indiana Gross Income Tax Act of 1933, which has been before this Court in a series of cases beginning with *Adams Mfg. Co. v. Storen*, 304 U. S. 307." It is also one in a series of cases involving state taxes measured by gross receipts as follows, in chronological order:

Fisher's Blend Station, Inc. v. Tax Commission et al. (1936), 297 U. S. 650, 56 Sup. Ct. 608, reversing and remanding 182 Wash. 163, 45 Pac. 2d 942, 49 Pac. 2d 1151;

Puget Sound Stevedoring Co. v. State Tax Commission (1937), 302 U. S. 90, 58 Sup. Ct. 72, modifying 189 Wash. 131, 63 Pac. 2d 532;

Western Live Stock et al. v. Bureau of Revenue et al. (1938), 303 U. S. 250, 58 Sup. Ct. 546, affirming 41 N. M. 288, 67 Pac. 2d 505.

J. D. Adams Manufacturing Co. v. Storen, et al. (1938), 304 U. S. 307, 58 Sup. Ct. 913, affirming in part and reversing in part 212 Ind. 343, 7 N. E. 2d 941;

James v. United Artists Corp. (1939), 305 U. S. 410, 59 Sup. Ct. 272, affirming 23 Fed. Supp. 353;

Gwin, White & Prince, Inc. v. Henneford, et al. (1939), 305 U. S. 434, 59 Sup. Ct. 325, reversing 193 Wash. 451, 75 Pac. 2d 1017;

Department of Treasury of Indiana, et al. v. Wood Preserving Corporation (1941), 313 U. S. 62, 61 Sup. Ct. 885, reversing 114 Fed. 2d 922;

Department of Treasury of Indiana, et al v. Ingram-Richardson Manufacturing Co., of Indiana, Inc. (1941), 313 U. S. 252, 61 Sup. Ct. 866, reversing 114 Fed. 2d 889;

International Harvester Co., et al v. Department of Treasury (1944), 322 U. S. 340, 64 Sup. Ct. 1019, affirming 221 Ind. 416, 47 N. E. 2d 150;

McLeod v. J. E. Dilworth Company et al (1944), 322 U. S. 327, 64 Sup. Ct. 1023, affirming 205 Ark. —, 171 S. W. 2d 62.

Each of the cited cases deals with the impact of the commerce clause, Article 1, Section 8, Constitution of the United States upon the taxing power of state and local government. The following decisions decided during the same period of time also treated directly with like considerations: *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 60 Sup. Ct. 388, reversing 281 N. Y. 610, 670, 22 N. E. 2d 173, 764; *McGoldrick v. Felt & Tarrant Mfg. Co.* (1940), 309 U. S. 70, 60 Sup. Ct. 404, reversing 279 N. Y. 678, 18 N. E. 2d 311; 280 N. Y. 688, 21 N. E. 2d 197; 281 N. Y. 608, 669; 22 N. E. 2d 177, 763.

The question before the Court in the instant case was whether the State of Indiana might, in imposing its tax upon the privilege of domicile or the privilege of transacting business within the State, include in the measure

thereof the proceeds from sales of securities to non-local purchasers through the media of independent sales agencies within and without the State of Indiana. The question raised by the majority opinion is whether this tax is a direct imposition upon an interstate sale and as such an interference by a state with the freedom of interstate commerce. The fundamental question which *amici curiae* seek to have determined is whether the limiting effect of the commerce clause upon state tax legislation is to be found applicable in every case in which interstate commerce exists or whether the criteria announced in the *Adams* case, *supra*, and in subsequent cases are to continue to furnish the guides for determining the limiting effect of the commerce clause upon the tax powers of the States.

ARGUMENT

I

The Indiana Supreme Court has concluded that the Indiana gross income tax is an "excise levied upon those domiciled within the state or who derive income from sources within the State, upon the basis of the privilege of domicile or the privilege of transacting business within the State and that the burden may reasonably be measured by the amount of income." *Miles v. Dept. of Treasury*, 409 Ind. 172, 182, appeal dismissed 298 U. S. 640.

The amount charged by particular states for exercising such a privilege is a cost of doing business in those states, but "* * * the bare fact that one is carrying on interstate commerce does not relieve him from any forms of state taxation which add to the cost of his business * * *". *Western Live Stock et al v. Bureau of Revenue et al.* (1938), 303 U. S. 250, 58 Sup. Ct. 546.

II

Freeman is the person here sought to be taxed. The tax, when paid, becomes a cost of doing business. The tax could not be duplicated, he could not incur a similar cost of doing business, in any other jurisdiction. The tax, as imposed, could not deter the flow of interstate commerce, because it is obvious that no different result would obtain in Freeman's liability had he refrained from making interstate sales. The tax, as applied, has no possibility of the dangerous consequences to interstate commerce

pointed out in the *Berwind-White* case, supra, and equality is its theme as it is presently administered by the Department of Treasury of the State of Indiana. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 48. Freeman received the same income whether he paid the tax or not. He paid the same tax whether local or interstate sales were involved. He did not do business in any other jurisdiction with respect to these sales, so that he was subject to no other taxing jurisdiction and an apportionment of his tax would be, from the facts of the cases, measured in an apportionment of 100% to the State of Indiana, and, though we do not consider it controlling, he could hardly, from the nature of the transactions in which he engaged, pass on the amount of the tax to his purchasers, since it is hard to see how sellers of securities on the New York Stock Exchange would receive anything but the going market price, less usual brokerage charges.

III

Such state taxation, when not sustained, has been struck down when it has been discriminatory and singled out interstate commerce (*Philadelphia and Southern S. S. Company v. Pennsylvania*, 122 U. S. 326); when it has not been fairly apportioned, (*Gwin, White & Prince, Inc., v. Henneford et al* (1939), 304 U. S. 307, 58 Sup. Ct. 913); when it has resulted in subjecting interstate commerce to the risk of a multiple tax burden, (*J. D. Adams Manufacturing Co. v. Storen et al* (1938), 304 U. S. 307, 58 Sup. Ct. 913).

The majority opinion says "of course this is an interstate sale". Granting, but not conceding, that such is the case, it does not from that fact follow that a local tax upon the privilege of doing business, affecting all who exercise the privilege within the jurisdiction in the same manner, which includes the proceeds of such a sale within the measure thereof is a direct imposition upon interstate commerce and consequently offensive to the Constitution of the United States.

The position of amici curiae is, and they respectfully request the court to hold, that privilege taxes levied upon local residents for the privilege of doing business are not direct levies upon interstate commerce; that they are direct levies upon local residents; that they may be improper when they include as a measure of liability proceeds from certain interstate sales; that improper inclusion of the proceeds of an interstate sale in the measure of a gross income privilege tax makes such taxes invalid but does not necessarily constitute them direct taxes upon interstate commerce. This position, taken in response to the majority pronouncement indicates the unsatisfactory nature of the "legal incidence" approach to the validity of state tax statutes under the commerce clause. As the court has indicated in its decisions, it is the commerce itself which is to be protected against burden and impediment and mere choice of words in legislation cannot deprive the commerce clause of its effectiveness. A purely formalistic approach brings no satisfactory answer.

IV

By the commerce clause Congress is given the power to regulate commerce among the several states. Congress has not attempted to make any regulation with respect to the effect upon that commerce of gross income taxes levied by the several states. The majority opinion points out however that even without such implementing legislation, the commerce clause is a limitation upon the power of the states. But such limitation as is imposed by the commerce clause exists only from the implications thereof. Taxes by states involving interstate commerce are not to be sustained when they single out interstate commerce for hostile action or have the effect of impeding the free flow of trade between states. Conversely, unless such taxes may be said to have such effect, they do not violate the commerce clause.

To find that a sale in interstate commerce has been made and has somehow been considered in determining the amount of local tax imposed on local individuals is not ipse dicta to find that such a tax is within the area created by the force of the commerce clause itself as being free from interference by the states. Further, it must appear in addition to the fact that commerce is being done, that the tax has imposed burdens upon, or impedes that commerce so as to amount to a regulation thereof. "Not every local law that affects commerce is a regulation of it in a constitutional sense" *(Western Live Stock et al v. Bureau of Revenue et al, supra.)*. Those taxes that have been found to violate the commerce clause must be said to have

been found by the court to be a regulation of commerce in the constitutional sense.

V

Because of the ramifications of modern business and the gradually expanding fields of national interconnection, increasing numbers of transactions and modes of doing business assume interstate aspects. It has appeared to those entrusted by the laws of the various states with the duty of administering their respective tax laws that the decisions of the court must serve as a guide in determining the limits and the proper manner and application of state taxing authority. This is right and proper, for the language of the commerce clause alone does not serve such purpose.

VI

From the cases cited in p. 1 of this brief, a semblance of order has appeared and from them the principles enunciated by the court have seemed to direct that a tax imposed directly upon interstate commerce would be unconstitutional, while tax imposed on a local activity would be sustained, even though incidentally affecting interstate commerce, if it did not subject the commerce incidentally affected to the risk of multiple taxation; if it did not discriminate against interstate commerce; if it did not deny an apportionment in cases where the levy were capable of reproduction in other state taxing forums.

In the dissenting opinion of Mr. Justice Rutlege in the case of *McLeod v. J. E. Dilworth Company* a resume to this effect appears:

> "The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corrollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 55-56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton v. Missouri*, 91 U. S. at 275; *Guy v. Baltimore*, 100 U. S. 434; *Voight v. Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434; *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special."

VII

For the court to state, as did the majority in this case, that no good purpose would be served by reviewing the

past cases and that each case in this field "must be read in the opinion of the particular cases and as the production of preoccupation with their special facts" is to cut tax administrators adrift in a sea of hopeless confusion. The decisions of the court constitute the only guide for continuity of administrative policy in the interpretation of the commerce clause as it affects state taxation. It should be the function of the court to attempt, as it has in the past, to harmonize, if possible, what has been said in the past so as to clarify and serve as a guide for the future. If the court does not perform this function, if there is no reasonable predictability in the law applying to this field, the very basis for the rule of stare decisis is itself threatened. If, indeed, each case is to rest upon its own special facts with no attempt to place it within a framework of judicial interpretation, the result cannot be otherwise than to encourage a multiplicity of litigation in the interstate commerce taxation field. If the court proposes to strike down taxes which affect interstate commerce without dealing in considerations of fairness or unfairness, that rule should be announced. If considerations of fairness or unfairness are to be weighed where interstate commerce is incidentally affected, the court should set the standards of weight. We take the position that the *Adams, Gwin, White & Prince, Berwind-White, Fisher's Blend, Dilworth* and other related cases set standards and we petition the court to apply such standards to the instant case to fit it into this framework of decisions.

The court will recognize that not all tax administrators are trained in the law nor are they all lawyers. These administrators turned to various sources as guides and also

to various tax services. Certainly the court should be concerned with this aspect of its decisions as are amici. We respectfully quote a report appearing in the Lawyers Weekly Letter, a publication printed by Prentice-Hall, Vol. 2, No. 13 issue of December 23rd, 1946:

> "Supreme Court Decisions: Freeman v. Hewitt (No. 3): This is probably the most revolutionary —and certainly the least understandable—decision of the Court on state taxation of interstate commerce in many years. To quote the separate concurring opinion of Justice Rutledge: 'This is a case in which the grounding of the decision is more important than the decision itself.' • • •"
>
> "• • • It is impossible to overestimate the importance of the decision or to predict its results. Taken literally, the majority opinion can be read to mean that no state taxes on interstate commerce are permissible except a use tax imposed on the consumption of goods within the state of consignment. • • •"

VIII

Following the reasoning of the majority opinion, we agree with the starting premise that the commerce clause of its own force creates an area free from state interference. Nor can there be any question that a state is precluded from taking any action which fairly may be deemed to have the effect of impeding the free flow of interstate commerce. We cannot disagree with the statement that the mere fact that local commerce and interstate commerce bear the same burden locally is insufficient ground upon which to base a contention of validity in the face of the

commerce clause. We agree with the majority opinion that a remote or unsubstantial interference with a national interest (interstate commerce) may in some cases be insufficient to result in the overriding of local legislation.

The next point made in the decision is that state taxation falling on interstate commerce can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. Whether this is a holding of the court or an argumentative statement, it is one with which amici cannot agree, for state taxation, no matter where it falls, is justified by the exercise of state constitutional powers. Striking down of state tax legislation on the basis of the delegation of power made to the Congress of the United States in Article 1, Section 8 of the Constitution of the United States can be justified only if it is absolutely necessary by such means to protect interstate commerce against discrimination and undue burdens, and to allow the free flow of trade between the several states. The court's scrutiny of state taxes is well justified. That scrutiny should always involve the consideration of whether in affording to interstate commerce the necessary insulation, more is not taken from the states than was actually delegated to the Congress by them.

IX

Proceeding further, the court states that the *fact* of a tax on interstate commerce puts impediments upon the currents of Congress across the state line and the court points out that the commerce clause was designed to prevent states from exacting toll from those engaged in na-

tional commerce. It might be said that the commerce clause was designed to enable Congress to set standards of fairness by which commerce among the states might be regulated, but, accepting the court's statement, it does not necessarily follow that any tax on interstate commerce will place impediments upon it. This language would seem to be directly contra to that used by Mr. Justice Stone in the *Gwin, White & Prince, Inc., v. Henneford et al.*, case, *supra*, where more than the mere fact of such tax was said to be necessary. The tax was found to be bad because, though measured by the entire volume of the interstate commerce, it was not apportioned to the local activity of the taxpayer within the taxing state. The statement of facts contained in the record of the case showed that appellant had representatives at numerous points outside the State of Washington who acted on its behalf. Clearly some part of the total proceeds from the commerce engaged in were allocable to these extrastate activities. To that extent *Gwin, White & Prince* might have been subjected to tax with respect thereto by jurisdictions outside the State of Washington. If the test of apportionment is to be applied here, however, and the decision implies that this tax is comparable to a direct unapportioned tax on gross receipts, it is inconceivable that any less than 100% of Freeman's activities could be allocated to the State of Indiana. He had no representatives outside of the State. It is true that he dealt with persons in other states, but he had no place of business anywhere but in the State of Indiana. It and no other jurisdiction could possibly have subjected him to a tax measured by his gross receipts. This, the court will bear in mind, is a different state of facts than

that which existed in either the *Adams* case or the case of *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740 (1943) affirming 220 Indiana 340, 42 N. E. 2d 34 (1942).

In each of those cases Indiana sought to tax a domestic corporation, with principal place of business in Indiana. Each corporation had places of business outside of said State. In the *Adams* case, the vice of the statute was that it measured the tax by including activities of interstate commerce without apportionment, and that such commerce might thus be subjected to a ruinous double burden. It was decided first and the Indiana Supreme Court rightly found, when confronted with the *Allied Mills* case, that there was no possibility of multiple taxation in the State to which the goods were shipped because, on the authority of the *Adams* case, the shipping State could not impose such tax. This case was affirmed per curiam as above cited. The considerations which the Indiana Court had to balance after the *Adams* case, which it did so balance to the satisfaction of this Court, are not present in the instant case, because the taxpayer had no place of business outside of the State of Indiana, was not in fact, "doing business" outside the State of Indiana and any effect on interstate commerce, if such there was, was purely incidental, remote and unsubstantial.

On page 8 of the majority opinion herein, in speaking of the invalidity of a direct unapportioned tax on gross receipts as being beyond the State taxing power, the Court cited, among other cases, *Puget Sound Stevedoring Co. v. State Tax Commission* (1937), 302 U. S. 90, 58 Sup. Ct. 72. This case, by reason of the cases of *Joseph McGoldrick et al.*

v. John T. Clark & Son, and *Joseph D. McGoldrick et al. v. Carter & Weekes Stevedoring Co.,* heard by the Court in reargument on the twelfth day of November, 1946, is being questioned and we respectfully request the Court to apply to its previous decision in the *Puget Sound Stevedoring Co.,* and in the *Fisher's Blend* case, *supra,* the reasoning of the later cases herein cited, which set forth reasonable rules for preservation of State taxing power, while saving to interstate commerce the full protection to which it is entitled under the commerce clause.

CONCLUSION

We respectfully petition the Court to review its opinion herein. We respectfully petition that the Court apply to the facts of the record the criteria announced in the decisions to which we have referred.

We respectfully petition the Court to clarify its opinion and to furnish a guide for future State administrative and legislative action. And we further petition the Court to withhold any final decision in the instant matter until announcement of the pending decision in the companion cases *Joseph D. McGoldrick, et al v. Carter & Weekes Stevedoring Co., and Joseph D. McGoldrick, et al v. John T. Clark & Son,* Nos. 29 and 30, October term 1946.

We finally urge the Court that a rehearing be granted because the interests of the States represented by petitioners herein is so vital, and we request that petitioners

be permitted to present their views by oral argument before the Court.

Respectfully submitted,

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I join with petitioners insofar as they have asked for a clarification of the scope of the majority decision.

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